

THE ADVANCE MADE BY TREATIES OF ARBITRATION¹

If we would understand the nature of the advance that has been made in the organization of international justice we must study it from the standpoint of treaties of arbitration. We are told that we have moved farther forward in arbitration in the past ten years than in the century preceding them; but the foundations of

¹ This article deals with the history of the progress of arbitration and other pacific methods of settling international disputes. Written before the war broke out, it may be taken as an outline of the subject up to about August 1, 1914.

It is interesting to note that the Servian reply to the ultimatum of Austria proposed a reference of disputed points to the international tribunal at The Hague, or to the Great Powers which took part in drawing up a declaration made by the Servian Government March 18, 1909. Had the proposition of Sir Edward Grey been accepted, another method of pacific settlement than those to which I have referred, namely, a diplomatic discussion, might have been recorded. It is to be hoped, however, that with the lessons of this war before us, it may be possible hereafter to call a conference of Powers to deal in season with a like situation.

Five important peace gatherings of unofficial character were called for the summer of 1914: the Peace Congress of delegates of Protestant churches at Constance, of delegates of Catholic churches at Liege, the Conference of the Inter-Parliamentary Union at Stockholm, the meeting of the International Law Association at The Hague, and the International Peace Congress at Vienna. All these were postponed on account of the war excepting the Church Peace Congress at Constance. This met a day before its scheduled time, passed resolutions, appealed to the Powers to avoid war, and appointed an Executive Committee to organize the peace work of the churches on an international and interdenominational basis. None of these bodies, however, is likely to permit its work permanently to be stopped by the war, or to be long delayed when it is over. Interest in the world peace movement is already greatly accelerated by the conflict. Thousands of people have become students of international law and ethics who formerly supposed these subjects to be of academic rather than of vital interest. The enlightenment of public opinion on questions of the sanctity of treaties, the rights of small nations, and the rules of civilized warfare is bound to tell in future Hague Conferences. These it is believed will function as never before. The range of their discussions is likely to be enlarged until in time it may include controversial questions of world-wide importance which may be adjusted by legislation instead of being subjected to the chances of war. The war has stimulated interest in the principle of world federation as more rational than that of the balance of power.

this progress have all been laid in the past. Were it not so, the new treaties that have been negotiated by our Department of State might be of doubtful value. It is because they are a part of an historical development that they contain the promise of practical utility in the future.

Let us review some of this progress from the standpoint of American experience, but note also where, in the general course of arbitration, we make connecting links with other nations.

First of all, there has been progress in the manner in which provision is made by treaty for an arbitration. Originally agreements to refer a dispute to arbitration looked backward to questions that had already arisen between governments. For example, in the Jay Treaty, an arrangement was made for a commission to ascertain what river was meant by the St. Croix in the treaty of 1783, which was supposed to define the boundary between the United States and Canada, over which there was a dispute. Sometimes a dispute passed into an acute stage of international feeling before arbitration was proposed. Although the St. Croix question was not a dangerous one, another controversy for which the Jay Treaty provided an arbitration, the recovery of debts owed by American citizens to British subjects before the Revolution, the collection of which had been barred by State acts that were passed during the war, had exasperated British creditors, and created among them a warlike feeling.

The next step was a combination of methods that looked partly backward and partly forward. It was taken in the Treaty of Ghent which closed the war of 1812. That treaty left several important disputes unsettled. One of them related to the ownership of certain islands in Passamaquoddy Bay and the Bay of Fundy, another to the northeastern boundary of the United States from the source of the river St. Croix to the river St. Lawrence, and still another to the boundary along the middle of the Great Lakes and of their water communications to the most northwestern point of the Lake of the Woods. In every one of these cases a commission was to be created in pursuance of the Treaty of Ghent, consisting of a representative of each country. If the commissioners agreed, their decision was to be final. If, however, they disagreed, the question or questions left at issue were to be referred to a friendly sovereign or state as arbitrator. Fortunately in two of these disputes the commissioners agreed. One of them, the controversy relating to the northeastern boundary, was referred to the King of the Nether-

lands as arbitrator, but as he exceeded his powers, that dispute and the difference arising over the lake and land line, which could not be ended by commissioners, were adjusted by Lord Ashburton and Daniel Webster.

Another forward step was taken, this time of a more distinct character, when by the Treaty of Guadalupe Hidalgo, which made peace between the United States and Mexico, after the Mexican war (1848), a clause was inserted by which arbitration or formal negotiation was to be the main reliance for peace between our two countries in the future. The arrangement that was then made might well be printed and posted in every Mexican and American home. It provides in part that if any dispute should arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of these nations, promised each other that they would endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries' were then placing themselves, using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be able to come to an agreement, a resort should not on this account be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the Government of that which deemed itself aggrieved should have maturely considered, in the spirit of peace and good neighborhood, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed by each side, or by that of a friendly nation. And should such course be proposed by either party, it should be acceded to by the other, unless esteemed by it altogether incompatible with the nature of the difference or the circumstances of the case.

Following along for two or three decades, but particularly between 1870 and 1880, it became a fashion among nations to insert in their treaties of amity or commerce, arbitral clauses so called, providing that if a dispute should arise over the interpretation or execution of these treaties it should be referred to arbitration.

In the last twenty-five years of the nineteenth century arbitration was encouraged by resolutions passed by the Senate and House of Representatives of the United States. Two notable

instances occurred of attempts to put these declarations of principle into practice by formulating them into treaties. One of them was the treaty proposed by Switzerland in 1883, which was not accepted by the United States, and that with Great Britain in 1897, the Olney-Pauncefote treaty, which missed consent to ratification in the United States Senate by a very narrow margin. These were arbitration treaties pure and simple. They were not a part of treaties relating to other subjects, like the Jay treaty, the Treaty of Ghent, and the treaties of amity and commerce already referred to. They did not go back to questions that had already arisen and had to be settled judicially or left to the mercy of public passions already aroused, but they looked forward to the contingency of new disputes, the precise character of which only the future could reveal. They were of an entirely new order, representing a new stage of progress in the formulæ of arbitration treaties. The Swiss treaty, which was far ahead of the times, provided for the settlement of all controversies by arbitration "whatever may be the cause, the nature, or the object of such difficulties." The Olney-Pauncefote treaty provided for the arbitration of certain classes of questions, but they were important, territorial as well as large pecuniary claims being considered as justiciable. Both of these treaties may be called general treaties, a term now in use, to distinguish them from special treaties. General treaties of arbitration provide for the reference of all questions or classes of questions arising in the future; special treaties relate to a particular issue, as for example a controversy over pecuniary claims, which, having already risen, is made a case by itself for arbitration without regard to a standing treaty. Nearly all arbitration treaties that are made to-day are to be classed as general.

The era of general treaties of arbitration may be said to have been finally ushered in by the Anglo-French treaty of 1903, which proved to be the basis of many arbitration treaties that have been negotiated since that date and which practically repeat the same terms and conditions. Twenty-four treaties like the Anglo-French treaty were negotiated by Mr. Root during the administration of President Roosevelt, and are known as the Root treaties. They ran for a term of five years and some of them have since been renewed. These had been preceded by several like treaties during the secretaryship of Mr. Hay, but, owing to a difference over a question of prerogative between the President and the Senate as to the constitutional necessity of

submitting to the Senate for approval the special agreement setting forth the conditions relating to each specific case of arbitration as it should come up, the treaties had been withdrawn.

When arbitration treaties pure and simple came into vogue, they were made, as they are still made, between nations negotiating in pairs. If all the countries, each one with another throughout the world, were to draw up arbitration treaties in pairs, more than a thousand separate agreements would be necessary to complete the circle of the family of nations. But to the practical American mind, that believes in the conservation of international as well as other forms of energy, it seems as if a collective arrangement could be made by which the nations by a single enactment at The Hague might make a universal treaty embodying the essentials of the manifold separate treaties that are now in force. A collective arbitration system was one of the dreams of Secretary Blaine for the Pan-American nations as far back as the first Pan-American Conference of 1889-90 and has been brought forward in other Pan-American Conferences since that time, but it has never been realized. The United States government thought, however, that the world was ready for a collective treaty for all nations at the time of the Second Hague Conference in 1907, especially as 33 nations had at that time made arbitration treaties. An attempt to secure such treaty, based upon the model of the Anglo-French treaty, with a specific list of arbitrable questions, was led at that time by the United States, Great Britain and Portugal; and for it about three-fourths of the nations voted; but as there was not a unanimous agreement, unanimity or the next thing to it being by rule required before the measure can pass through a Hague Conference, the nations were thrown back upon the present system of negotiating treaties in pairs. Failure was due chiefly to the opposition of Germany and Austria, whose influential delegates argued against the measure, and partly to Italy, a third member of the Triple Alliance, who abstained from voting, as well as to a few other nations who turned the scales. But hope is in sight that a similar plan may meet with acceptance in 1915 or 1916 when the Third Hague Conference convenes. The German jurist, Dr. Zorn, who was a member of the German delegation that opposed the American plan in 1907, came out at the recent Conference of the Inter-Parliamentary Union at Geneva in favor of a Universal treaty. His change of attitude may be prophetic of the future position of the German government on this question.

Within the past decade, which has been so fruitful in treaties of arbitration, there has been a gradual development from treaties of limited scope to treaties of an all inclusive nature. Arbitration treaties nowadays usually agree to refer controversies to the Permanent Court of Arbitration at The Hague; but disputes may also be submitted to a special tribunal or to a sovereign, as in former days. Many arbitration treaties conform to the standard set by the Anglo-French treaty. This provides for the settlement of international disputes of a judicial order, or relative to the interpretation of existing treaties, which diplomacy cannot settle; but usually stipulation is made that questions affecting the vital interests, independence or national honor of the two contracting parties, or the interest of third parties, are excepted from arbitration. A treaty between Norway and Sweden advanced beyond this stage by an agreement that the preliminary question whether or not a dispute involved vital interests should, in case of doubt, be referred to the Hague Court. Denmark and the Netherlands went farther still in their treaties by agreeing to refer to the Hague Court all mutual differences and disputes. This is called a treaty without reserves and is an ideal towards which many advocates of peace are working. Such a treaty was attempted by Mr. Taft in 1911, when he proposed to Great Britain and France that all differences arising between them that were justiciable by being susceptible of judicial settlement by the principles of law and equity, unless they could be settled by diplomacy, should be referred to the Hague Court or some other arbitration tribunal; but disagreement with the Senate arose over the question of having a joint commission decide the preliminary question, whether or not, in a case of doubt, a given dispute came under the classification of justiciable subjects. The Taft treaties having failed to secure the consent of the Senate, were left unratified. The debate on the constitutional prerogative of the Senate was due in a large measure to a fear, whether justified or not, that the United States might some day be called upon against its will to arbitrate a case of vital interests or national honor. As between Canada and the United States, however, the International Boundaries treaty which was made in 1909, and seemed during the campaign for the arbitration treaties to have escaped the eyes of most peace advocates and statesmen, created a permanent joint commission to consider every question that may arise in regard to our boundary, and provides for an automatic reference to arbitration of serious differences, with

the consent of the United States Senate and the Governor General in Council of Canada. In that treaty, however, nothing is said about questions of honor; although primarily it relates to boundaries, it is a treaty practically without reserves. And we also understand that within the past year the Department of State has endeavored to negotiate treaties without reserves. We hope there will be further progress to report in this direction in the future.

The typical arbitration treaties that have been made in recent years have usually provided for arbitration only, but there is a tendency to-day to make supplementary treaties providing for resort to an international commission of inquiry or mediation, as an adjunct to the arbitration system.

The International Commission plan is associated with the distinguished name of our Secretary of State, Hon. William J. Bryan, and from his devotion to this idea, beginning with his speech before the Inter-Parliamentary Union in 1906, he is entitled to our gratitude. The Bryan plan, however, is not in all respects a novelty. It is but a stage in the evolution of the peace system of the nations. Historically this plan dates back to the numerous joint commissions that have settled boundary lines or determined any questions of fact. The international commission was made a part of the Hague Peace System in 1899, but, like about everything else relating to that system, it was intended only for voluntary use. The international commission was successfully tried by Russia and Great Britain after the Russian fleet fired upon the British fishermen in the North Sea. The procedure followed by the North Sea Commission was made a part of the Hague Conventions in 1907. Resort to an International Commission of Inquiry was even then left voluntary, although in the opinion of the nations, as expressed by the Hague Conventions, it might under some circumstances be expedient and desirable. The idea, however, apart from the arrangement for the jurisdictional commissions, was embodied in the Taft arbitration treaties, by which, had they been ratified, it would have become a matter of obligation between the United States and Great Britain, and the United States and France, upon the request of either power. Mr. Bryan has again extended the commission idea by putting it into treaty form and making it obligatory. Furthermore he has provided for a standing commission, the names of the members of which shall be known in advance. This commission is to have the power of initiative so that it can act if the governments themselves do

not. The power of initiative is new. There is an equally radical clause providing that while a dispute is under investigation by a commission, there shall be no declaration of war, no further war preparations and no hostilities; the armaments clause may not be practical for certain European and other countries, but as a political experiment in armaments, proposed by the United States, it is conservative when compared with the Rush-Bagot agreement which a hundred years ago reduced the quotas of warships on the Lakes to the limit of insignificance, and made naval preparations as between the United States and Canada, in those waters, whether pending or not pending the investigation of a dispute, a course of action unthinkable. Mr. Bryan's additions to the commission method are a logical part of the international development of our day and quite in accord with those American traditions of peace and arbitration which by his speeches he himself has already done much to establish. Therefore his plan, which fortunately is in part grounded in experience, marks in some details a new stage in the history of arbitration treaties and registers the point of farthest advance.

In accordance with the spirit of the Hague Convention for the pacific settlement of international disputes, the A. B. C. mediation was a voluntary and friendly act as between the United States and the three republics of South America, but we may to a certain extent consider it as already impliedly obligatory between Mexico and the United States, these two countries, as already indicated, having bound themselves by the treaty of Guadalupe Hidalgo to resort to pacific methods of settlement before going to war. The United States in 1848 as in 1794 stood in the vanguard of the peace forces of the world and there is where we should stand to-day. What we should do now or in the near future is to incorporate mediation into a series of treaties like those now being negotiated by Mr. Bryan for international commissions of inquiry, and so have another adjunct to arbitration for automatic use. This principle was adopted by the European powers in 1856 and incorporated by the General Act of the Conference of Berlin in 1885. It was embodied in the Olney-Pauncefote treaty of 1897. It was made a part of the Hague Conventions in 1899 and 1907; but its use, in respect to offers of mediation by third parties, was left voluntary, while resort to it by the two parties at issue was left in the form of a general promise. Members of the Inter-Parliamentary Union have within recent years proposed to take mediation out of the category of the

voluntary peace-making by inserting an agreement to resort to it into treaties between nations, thus beyond question making recourse to it obligatory. We may therefore feel assured that the extension by treaty of this principle, which already has the approval of the Hague Conference, will be a step forward in the right direction.

To sum up, we can say that we have a system of arbitration treaties by which in our relations with some countries we can refer certain disputes, chiefly those of a legal character, to arbitration, and that practically all treaties of arbitration that are now negotiated look forward to the future instead of backward to the past. There is now a marked tendency among nations acting in pairs to develop the Hague Peace System by negotiating separate treaties, or inserting clauses in existing treaties to establish standing international commissions of inquiry and an agreement to use mediation before resorting to war. When this threefold arrangement is completed, if a dispute arises which we cannot settle by diplomacy, the following may be the order of events: (1), the dispute may be referred to an international commission of inquiry to ascertain the facts; (2), having learned the true facts from the commission, we may send the issues—the points of difference—to the Hague tribunal for arbitration; (3), if satisfaction cannot be obtained there, and hostilities should threaten, we shall be obligated by treaty to resort to mediation before war can begin. Such a threefold provision once established ought to be a safeguard, and should render war between conscientious nations exceedingly difficult even in our own time.

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